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In the Supreme Court of the United States

OCTOBER TERM, 1979

MICHAEL GEORGE THEVIS AND ANNA JEANETTE EVANS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The per curiam order of the court of appeals (Pet. App. i-ii) is not reported. The opinion of the district court is reported at 469 F. Supp. 490.[1]

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[1] Petitioners failed to append the opinion of the district court to their petition, as required by Sup. Ct. R. 36(1). For the convenience of the Court, we have lodged ten copies of the opinion with the Clerk.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1979. A petition for rehearing was denied on December 18, 1979 (Pet. App. ix-xii). The petition for a writ of certiorari was filed on January 21, 1980, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether statements uttered during the course of petitioners' detention should have been suppressed as evidence.

2. Whether a warrant authorizing the search of petitioners' automobile was supported by probable cause.

STATEMENT

Following indictment in the United States District Court for the District of Connecticut, petitioner Thevis pleaded guilty to one count of possessing a false passport, in violation of 18 U.S.C. 494, and one count of unlawfully possessing firearms, in violation of 18 U.S.C. App. 1202. Petitioner Evans pleaded guilty to one count of harboring an escaped federal prisoner (petitioner Thevis), in violation of 18 U.S.C. 1072. Thevis was fined $5,000 and sentenced to two years' imprisonment, to run consecutively to sentences imposed on unrelated offenses.[2] Evans was sentenced to

[2] On April 28, 1978, Thevis escaped from a federal penitentiary in Indiana where he was serving a sentence as a result of a 1974 federal obscenity conviction and a 1975 federal racketeering conviction, both of which occurred in the Northern District of Georgia. In January 1979 Thevis received a four-year sentence in the Southern District of Indiana as a result of his conviction on escape charges, to be served consecutively to the sentences he was serving at the time of his escape. The instant sentence is to be served consecutively to Thevis's sentence for escape.

18 months' imprisonment, all but 90 days of which was suspended, to be followed by three years' probation. Petitioners, having reserved the right to do so, appealed the district court's denial of their motions to dismiss the indictments and its denial in part of their motions to suppress (469 F.Supp. 490). The court of appeals affirmed substantially for the reasons stated in the opinion of the district court (Pet. App. i-ii).

1. The evidence presented at a suppression hearing showed that on September 20, 1978, petitioner Thevis, using the name "Arby J. Evans," opened a savings account at the Bloomfield State Bank in Connecticut by depositing $3,000 in cash. He informed the bank that he had a post office box and that his street address was 19 Hill Farm Road (Tr. 116, 513-514, 524).[3]

On October 13, 1978, the Bloomfield State Bank received through the mail a $30,000 check for deposit into the "Arby J. Evans" account (Tr. 509-510). Because the check was a "starter check" drawn on a newly opened account in the name of "A. J. Evans" at a South Carolina bank, bank personnel became

[3] "Tr." refers to the transcript of the motions hearing in district court.

suspicious (Tr. 510, 513, 525). The bank president, Joseph Gozzo, examined the signature card of the account and found that a North Carolina driver's license had been used as identification in opening the account (Tr. 513-514). Gozzo could find no listing for Arby J. Evans in the local telephone directory or through directory assistance in either North Carolina or South Carolina. He also determined that there was no "A. J. Evans" on Hill Farm Road (Tr. 515). Fearing a check kiting operation, Gozzo contacted the Bloomfield Police Department (Tr. 521).

On November 8, 1978, "Arby J. Evans" informed the bank that he was coming in at 9:30 the following morning to withdraw $31,000 from his account, in cash, that he wanted the money in a paper bag, and that he did not need to count it (Tr. 526-527).

Fearing that the "A. J. Evans" who was coming into the bank the following day might not be the owner of the funds (Tr. 534),[4] Gozzo went to 19 Hill Farm Road that afternoon and learned that the house at that address was owned by a party named Rifkind (Tr. 536).[5] Moreover, Gozzo made contact with the Bloomfield Branch of the Connecticut Bank and Trust Company and learned that "A. J. Evans" maintained $55,000 in an account at that bank and had also ad-

[4] The $30,000 check had cleared, so the account contained sufficient funds to cover the withdrawal (Tr. 518-519).

[5] The FBI later learned that petitioner was in fact living at that address, but this information was not communicated to the detaining officers until after petitioner had been arrested (469 F. Supp. at 496).

vised them that he intended to withdraw that sum in cash from that bank on November 9, 1978 (Tr. 539-540). Gozzo again called the Bloomfield Police Department and advised Deputy Chief Toce of all that he had learned (Tr. 540-541). Toce called FBI Special Agent Richard Foster (Tr. 28), and they made plans to be at the bank the following morning.

The next day, at about 9:30 a.m., petitioner Thevis came to the Bloomfield State Bank and identified himself as Arby J. Evans (Tr. 29-30). A bank employee advised Thevis that Gozzo wanted to talk with him prior to the withdrawal, and he directed Thevis to Gozzo's office (Tr. 550-551). There Gozzo asked for identification; petitioner gave him a driver's license in the name of "Arby J. Evans" and several credit cards (Tr. 551-553). At this point, Special Agent Foster (Tr. 553), Deputy Chief Toce, and Officer Thomas Beatty, who were in the office, introduced themselves to Thevis as law enforcement officers (Tr. 30). Gozzo then left his office.

Foster informed Thevis that he could have an attorney if he wanted one (Tr. 787-789). Petitioner did not ask for an attorney, nor did he express an unwillingness to speak with Foster and the other officers (469 F. Supp. at 497). Agent Foster explained that Thevis was not charged with any crime and that the bank simply wanted to be sure that he actually was "Arby J. Evans" (Tr. 116-120).

Officer Beatty had previously learned from authorities in North Carolina that the real "Arby J. Evans" was a personal friend of Mrs. Virginia Whit-

field, the Town Manager of Mebane, North Carolina (Tr. 31). The officers then placed a telephone call to Mrs. Whitfield's office in order to afford Thevis the opportunity to speak with her (*ibid.*). After Thevis spoke to Mrs. Whitfield, she informed Beatty that the person with whom she had just spoken was definitely not Arby J. Evans (Tr. 32).

At about this same time, Foster was advised by telephone that a maroon and silver 1979 Chevrolet with South Carolina license plates was parked in the parking lot, loaded with luggage. When Foster and Beatty approached the car, petitioner Evans was seated behind the steering wheel (Tr. 34-35); she deliberately avoided acknowledging their presence until Foster tapped on the window (Tr. 35). Foster and Beatty immediately identified themselves and displayed their credentials (Tr. 35-36). In response to Foster's request to see Evans' driver's license, she produced a Georgia operator's license in the name of Anna Jeanette Evans (Tr. 36). Foster asked Evans what relationship, if any, she had with the man in the bank (Tr. 35-36). Evans replied that she had come to the bank alone, that she knew no one by the name of Arby J. Evans, and that she knew no one inside the bank (Tr. 36).

Foster advised her that a man in the bank with a name similar to hers had an account in South Carolina, the same state in which her car was registered. Officer Beatty then asked her for the car's registration, which she could not produce (Tr. 139). When Special Agent Foster again commented on the similarity of names and geography, Evans admitted knowing petitioner Thevis, stating that he was a salesman whom she had met two weeks earlier in a Charleston, South Carolina, saloon (Tr. 36, 141). She said that she did not know the nature of the business that had brought "Arby Evans" to the bank; that she had just come up to Connecticut "for a fling" (Tr. 141); and that she had originally traveled from Atlanta to Charleston for some "action" (Tr. 142). When Foster commented that people desiring "action" would be more likely to leave Charleston for Atlanta, Evans claimed that the man in the bank was really her husband (Tr. 142-143).

Asked who owned the luggage in the back seat of the car, Evans replied that it was hers and that no one else was traveling with her and "Arby." Foster, however, observed in plain view through the car window that some of the luggage bore tags with the name "Sally Green." When Foster then asked who Sally Green was, Evans stated for the first time, "I don't want to answer any more questions at this time" (Tr. 143). She then acceded to Foster's request that she accompany him into the bank.

When Foster, Beatty, and Evans entered the bank, petitioner Thevis said, "I'm sorry I had to involve you as my sister." Evans then changed her story again, stating that she really was Thevis's sister. Five or ten minutes later, Agent Foster took petitioners to the Bloomfield police station (Tr. 39).

At the police station, the officers learned of a check theft and forgery ring that was operating in the area

of Mebane, North Carolina, and they learned that the description of some of the individuals involved fit petitioners. At approximately 10:20 a.m., Thevis first stated that he would like an attorney, and he thereafter secured the assistance of two attorneys (Tr. 42-49). During this period neither petitioner was interrogated (Tr. 44, 49).

At approximately 1:55 p.m., Agent Foster was informed by the Hartford office of the FBI that the man claiming to be "Arby J. Evans" actually might be Michael George Thevis, one of the FBI's ten most wanted fugitives. Upon learning this, Foster obtained a file of FBI "Wanted Posters" from Officer Beatty, located the flyer for petitioner Thevis, and displayed it to Thevis and his attorneys (Tr. 56).

In the presence of counsel, petitioner admitted he was Michael George Thevis (Tr. 56). Foster read the wanted poster to Thevis and his attorneys (*ibid.*), including the allegation that Thevis was known to use explosive devices and should therefore be approached cautiously (Tr. 57). Foster asked Thevis whether there was anything in the car that would explode when the automobile was searched, specifically inquiring, "What am I going to find?" (*ibid.*). Thevis replied, "About five hundred and sixty-one or two thousand dollars to be exact * * * [and] [a]bout a million in jewelry" (Tr. 57-58).

Thevis and Evans were later transported to the FBI office in Hartford and were there advised of their constitutional rights (Tr. 60, 64). Thereafter Thevis admitted that he had escaped from federal custody,

saying, "It wasn't really much of an escape. I just walked out the back door and kept going" (Tr. 62). During the late afternoon and evening hours of November 9, 1978, agents of the FBI obtained and executed a warrant to search the Chevrolet that petitioners had occupied. In it they found seven handguns, a false passport, approximately $412,000 in cash, and a large quantity of jewelry (469 F.Supp. at 510).

2. Prior to their plea hearing, petitioners moved to suppress all statements and physical evidence secured by the police subsequent to the time that Thevis entered the bank president's office. The district court, in a comprehensive opinion (469 F.Supp. 490-516), granted in part and denied in part petitioners' motions. The court found that the detention of Thevis in the bank was a lawful investigatory stop to ascertain his true identity and was based on a reasonable suspicion that he might be attempting to defraud either the bank or another innocent party. *Id.* at 501-505. The court nevertheless suppressed all statements made by Thevis while in the bank president's office as the product of a custodial interrogation unaccompanied by *Miranda* warnings. The court did, however, rule admissible Thevis's telephone conversation with the Mebane town manager, on the ground that it was not "testimonial" in nature but was merely voice identification. *Id.* at 505-507.

As to Evans, the court held that the questions directed at her in the parking lot were reasonable and lawful under *Terry* v. *Ohio*, 392 U.S. 1 (1968), and that her responses were admissible evidence. 469 F.

Supp. at 502. The court ruled that she was not in custody until she was taken from the car to the bank. It therefore suppressed those statements made by Evans in the bank in response to interrogation, although it held admissible her spontaneous conversation with Thevis concerning their contrived sibling relationship. *Id.* at 506-507.

The officers did not formally arrest petitioners at the time they moved them from the bank to the police station, but the district court found that at that point the officers had probable cause to believe that "Thevis was about to defraud either the two banks or the real Arby J. Evans of a total of $86,000," and that petitioner Evans was "a part of the scheme." 469 F. Supp. at 504. It therefore found the further detection lawful. The court further ruled that Thevis's statements, made in the presence of counsel, admitting his identity and his prison escape and divulging the contents of his car, were voluntary, intentional, and knowing waivers of his Fifth Amendment privilege. *Id.* at 508. As to the search of the Chevrolet, the court found that it was proper because it was made pursuant to a warrant based on probable cause, and, alternatively, that it was valid as an inventory search of an automobile in the custody of the FBI. *Id.* at 509-510.[6]

[6] Petitioner Evans also challenged the search of Thevis's wallet, a post office box, and two safe deposit boxes. The court held that she had no standing to contest the search of Thevis's wallet. The remaining searches, the court held, were all conducted pursuant to valid warrants issued on probable cause. 469 F. Supp. at 510-513.

The court of appeals affirmed for the reasons stated in the district court's opinion and rejected petitioners' suggestion that *Dunaway* v. *New York*, 442 U.S. 200 (1979), required a different result (Pet. App. i-ii).

ARGUMENT

1. Relying on *Dunaway* v. *New York*, 442 U.S. 200 (1979), and *Brown* v. *Illinois*, 422 U.S. 590 (1975), petitioners essentially contend (Pet. 8-12) that they were detained by officers in violation of the Fourth Amendment and that statements made by them subsequent to those detentions, some before and some after the issuance of *Miranda* warnings, were erroneously ruled admissible against them by the district court. In particular, petitioners rely on the principle established in *Brown*, and reaffirmed in *Dunaway*, that *Miranda* warnings, by themselves, do not automatically serve to break the causal connection between an illegal detention and statements subsequently made by the one detained.

These contentions are without merit because the district court, affirmed by the court of appeals, correctly concluded (1) that the initial detention of Thevis in the bank office was the equivalent of a lawful investigatory stop; (2) that Evans was not in custody at all until she was asked to accompany the officers into the bank; and (3) that probable cause existed to believe petitioners were collaborating in a fraud once Evans was brought into the office and exchanged opening remarks with Thevis. Because the district court was correct in its conclusion that peti-

tioners' detention was at all times supported either by a reasonable suspicion or by probable cause, and therefore was lawful, the court had no reason, as petitioners contend (Pet. 9), to consider whether their statements should have been suppressed as the fruit of an illegal arrest. See *Brown* v. *Illinois*, *supra*. In any event, the court suppressed all statements made by petitioners in either the bank or the police station that were not preceded by *Miranda* warnings, with the exception of statements made spontaneously (rather than in response to questioning) and statements made in the presence of counsel.

a. The detention of petitioner Thevis at the bank was a lawful investigatory stop supported by reasonable suspicion and hence consonant with the dictates of the Fourth Amendment. The detaining officers knew that a man using the name "Arby J. Evans" was planning to withdraw $86,000 from new accounts at two banks on the same day and that "Evans" wanted the cash in a paper bag and did not care to count it. They also knew that "Evans," who displayed a North Carolina driver's license, had deposited money in the Connecticut bank by using a starter check drawn on a South Carolina bank and that "Evans" appeared to give a false local address. These specific articulable facts warranted a brief detention for the purpose of ascertaining whether petitioner was indeed "Arby J. Evans." See *Brown* v. *Texas*, No. 77-6673 (June 25, 1979), slip op. 3-5; *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975); *Terry* v. *Ohio*, 392 U.S. 1, 30 (1968). As

the court observed (469 F.Supp. at 501), the mere fact that the starter check had cleared did not place petitioner Thevis above suspicion. The officers still had reason to believe that Thevis was not the real "Arby J. Evans," but was attempting to defraud that person of large sums of money. When the Mebane town manager informed the officers that Thevis was not Arby J. Evans, their suspicions that Thevis was masquerading under a false name were confirmed.

The brief detention of Thevis in the bank manager's office to establish his entitlement to the funds he was attempting to withdraw before they were given to him is quite unlike the detention found unlawful in *Dunaway*, *supra*; for there the police took the defendant to the police station without probable cause, issued *Miranda* warnings, and then interrogated him for several hours. (We note that this Court in *Dunaway* reaffirmed the lawfulness of a *Terry* stop followed by reasonable inquiries. *Dunaway* v. *New York*, *supra*, 442 U.S. at 208-211.) In any event, as noted above, the district court here suppressed all of Thevis's uncounseled responses to police interrogation prior to the issuance of *Miranda* warnings at the FBI office,[7] and as we show below (pages

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[7] Thevis's telephone conversation with the Mebane town manager was ruled admissible not for its substance, but only as a means of voice identification—Thevis' voice was identified as being different from that of Arby J. Evans. *United States* v. *Dionisio*, 410 U.S. 1 (1973); *United States* v. *Wade*, 388 U.S. 218 (1967). See also *United States* v. *Euge*, No. 78-1453 (February 20, 1980). On the other hand, the court suppressed Thevis's response to the police officer that he

14-15), the officers' reasonable suspicion had ripened into probable cause well before that time.

b. The district court was also correct in concluding that petitioner Evans was not "seized," within the meaning of the Fourth Amendment, at any time during the period in which she sat in her car in the bank parking lot and spoke with the police officers, since she was neither stopped nor detained. As Mr. Justice White observed in *Terry* v. *Ohio*, *supra*, 392 U.S. at 34 (concurring opinion), "[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets." She was free to discontinue the questioning at any time, and indeed she eventually did. Because Evans was not yet in custody, the police were not required to precede their questions with *Miranda* warnings, and *Dunaway* is simply inapplicable. Accordingly, neither Evans' Fourth nor her Fifth Amendment rights were violated in the bank parking lot.

c. When petitioner Evans was brought into the bank and pretended at first, in response to petitioner Thevis's leading remark, that she was his sister—a story in conflict with her series of inconsistent explanations given the officers in the parking lot concerning her relationship to Thevis—she added to the suspicious set of circumstances surrounding Thevis's attempted withdrawal of funds from the bank and, as

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knew the Mebane town manager, since Thevis had not first been given *Miranda* warnings. Contrary to petitioner's contention (Pet. 9), these two rulings of the district court are entirely compatible.

the district court correctly held, provided the officers with probable cause to believe that Thevis and Evans were collaborating in a scheme to defraud the real Arby J. Evans of $86,000. Hence, the continuation of petitioners' detention after the time that Evans was brought into the bank was permissible under the Fourth Amendment.

2. Finally, petitioners complain that the legality of the various searches should have been considered in conjunction with the legality of their detentions. Once again, we note that the fruit of the poisonous tree doctrine (see *Brown* v. *Illinois*, *supra*; *Wong Sun* v. *United States*, 371 U.S. 471 (1963)) is applicable only where there is a poisonous tree. Because the detentions were lawful, there was no reason to decide whether the searches were the fruits of those detentions.

Petitioners also apparently contend (Pet. 13) that some of their statements that were ruled inadmissible were nevertheless used to support a finding that the various searches for physical evidence under the search warrant were based on probable cause. They fail to document this claim. In any event, in reviewing the affidavits underlying the various search warrants, the district court excluded information obtained in violation of petitioners' constitutional rights, but nevertheless found that the remaining information in the affidavits was sufficient to establish probable cause. 469 F. Supp. at 511 n.17. For example, the affidavit in support of the warrant authorizing the search of the Chevrolet stated (*id.* at 510):

> * * * that Thevis had been apprehended as an escaped federal prisoner; that he was wanted in Georgia on two counts of murder and four counts of obstruction of justice; that Evans was seated in the car in the bank parking lot; that Thevis had told [Agent Foster] that there was half a million dollars in cash and a million and a half dollars' worth of jewelry in the car; and that Thevis had told a fellow prisoner that he was planning to flee the country with the help of Evans, who would provide him with money, false identification and a false passport.

None of the above information was obtained in violation of either petitioner's constitutional rights; yet certainly those statements provided the magistrate with probable cause to believe that evidence of a crime would be found in the car. In short, none of the physical evidence was seized in violation of petitioners' Fourth or Fifth Amendment rights.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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